86-258

No.

Supreme Court, U.S.
FILED
AUG 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

WINSLOW MANUFACTURING, INC.,
and WATSCO, INC.,
Defendants-Petitioners,

vs.

PHILLIP KAIN, d/b/a BROCK-KAIN,
Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

GERRIT H. WORMHOUDT
(Counsel of Record)
THOMAS D. KITCH
JOHN E. COWLES
FLEESON, GOOING, COULSON
& KITCH
Suite 1600, 125 N. Market
P.O. Box 997
Wichita, Kansas 67201
316-267-7361
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED

Has there been such a departure by the court of appeals from the usual and normal course of judicial proceedings, mandated by Rules 1, 50 and 60 of the Federal Rules of Civil Procedure, as to warrant the exercise of this Court's discretionary jurisdiction when, after a jury verdict against petitioners:

> the trial court, pursuant to petitioners' motion for judgment n.o.v., ordered a new trial upon determining that there was no evidence to support that verdict, but also gratuitously commented that judgment n.o.v. was not warranted;
>
> the second trial promptly resulted in a verdict and judgment for petitioners that was thereafter reversed by the court of appeals, which based its decision upon such gratuitous comment;
>
> thereafter the trial court, pursuant to Rule 60(b), corrected its gratuitous comment, but concluded that only the court of appeals had authority to prevent the manifest injustice that would result from reinstatement of the first verdict;
>
> but, on the second appeal, the Circuit Court held that the law of the case precluded any relief for petitioners; notwithstanding that federal trial courts and federal practitioners will continue to be faced with such outcome because of the misleading inconsistency between the plain language of the pertinent federal rules and the interpretation and application given to them and to the law of the case doctrine by the court of appeals?

LISTING OF SUBSIDIARIES

Cam-Stat, Inc.

Rho Sigma, Inc.

Watsco DSI, Inc.

Watsco International, Inc.

Watsco Export, Inc.

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Plaintiff-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners, Winslow Manufacturing, Inc. and Watsco, Inc., respectfully pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered herein on May 20, 1984.

OPINIONS DELIVERED IN THE COURT BELOW

The first opinion of the United States Court of Appeals for the Tenth Circuit is reported as *Kain v. Winslow Mfg.*, 736 F.2d 606 (10th Cir. 1984), *cert. denied,* ..... U.S. ....., 105 S. Ct. 1360 (1985), a copy of which it attached hereto as Appendix A. Following the first appeal, on remand to the district court, petitioners' motion for relief from

judgment under Fed. R. Civ. P. 60(b)(6) was granted in an unpublished opinion by the trial court, a copy of which appears in Appendix B. Thereafter, petitioners' motion to recall the mandate was denied by an unpublished Order of the Clerk of the Tenth Circuit Court of Appeals, a copy of which is contained in Appendix C. As a result of the Clerk's Order, petitioners' appeal was dismissed as moot by the Order and Judgment of the Tenth Circuit filed May 20, 1986, a copy of which is attached as Appendix D.

JURISDICTION

Petitioners seek review of the judgment of the Tenth Circuit Court of Appeals denying relief from a "manifest injustice" identified by the district court. This petition for certiorari was filed within ninety days following the final judgment of the Tenth Circuit Court of Appeals, filed May 20, 1986. 28 U.S.C. § 2101(c). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED IN THIS CASE

Fed. R. Civ. P. 60(b):

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On Motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered

in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

On January 20, 1976, respondent Phillip Kain, d/b/a Brock-Kain Company ("Kain"), filed suit in the United States District Court for the District of Kansas against Peel's Friendly Supply Company ("Peel's") and against

petitioner Watsco, Inc. and its subsidiary Winslow Manufacturing, Inc. ("Winslow"). Kain alleged violations of the Sherman Anti-Trust Act (15 U.S.C. § 1, *et seq.*), as well as claims for unfair competition and breach of contract. Federal question jurisdiction was invoked pursuant to 28 U.S.C. § 1331.

The action proceeded to trial, but before the case was submitted to the jury, the trial court dismissed the breach of contract claim and plaintiff withdrew its claim under the Robinson-Patman Act. On October 7, 1980, the jury returned a verdict against plaintiff Kain on his Sherman Act claim, but found that Peel's had engaged in unfair competition, and that Winslow had "knowingly assisted" Peel's in such misconduct. The jury awarded actual damages of $144,744 and punitive damages of $250,000 against all defendants.

The defendants filed timely post-trial motions. Defendants Winslow and Watsco moved for judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b), based primarily on the ground that there was no evidence to support the jury's verdict that Winslow had "knowingly assisted" Peel's in its acts of unfair competition with Kain. Because of their assessment that the record was devoid of any such proof, defendants Winslow and Watsco did not move for a new trial under Rule 59(d). The co-defendant moved for judgment n.o.v. or in the alternative for a new trial.

On November 13, 1981, the trial court filed its "Memorandum and Order Relative to Defendants' Post-Trial Motions." The court ordered a remittitur as to Peel's. Peel's thereafter entered into a settlement with Kain and is no longer active in this case. The court granted

Winslow and Watsco a new trial. In so doing, it agreed with defendants' assessments of the evidence:

> It was admitted that Winslow could totally revoke plaintiff's franchise for any or no reason. Plaintiff showed no reason why Winslow would engage in some type of complicated scheme to drive plaintiff out of business when it could simply revoke the franchise. The evidence shows that Winslow gave Peel's a franchise in the hopes of increasing business and that *Winslow and Watsco did not knowingly assist Peel's in practicing unfair competition against plaintiff.*

Memorandum and Order of November 13, 1981, p. 5 (emphasis added).

Both plaintiff and these defendants accepted the trial court's Order granting a new trial limited to the issue of whether Winslow had knowingly assisted Peel's unfair competition with Kain.[1] A second trial commenced in February of 1982. The second jury deliberated for less than one hour before returning a verdict in favor of petitioners, Watsco and Winslow.

On March 3, 1984, respondent Kain filed a Notice of Appeal to the Tenth Circuit Court of Appeals. Respondent's Notice of Appeal and docketing statement made no challenge to the trial court's authority to grant a new trial under Rule 50(b). This question was first raised in respondent's brief on the merits as "an additional issue" for the appellate court's consideration.

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1. In accepting the new trial, defendants relied upon the following express language in Rule 50(b):

> If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed.

Thereafter, the Tenth Circuit held that the trial court did not have discretion to order a new trial under Rule 50(b) because it had failed to comment that j.n.o.v. was "warranted," even though being denied in favor of granting a new trial. *Kain v. Winslow Mfg.*, 736 F.2d 606 (10th Cir. 1984), *cert. denied*, ... U.S. ....., 105 S. Ct. 1360 (1985). Without making any evaluation of the evidence or even acknowledging the trial court's affirmative statement that Winslow and Watsco had *not* knowingly assisted Peel's, the court of appeals directed that the original verdict against defendants be reinstated.

On October 15, 1984, Winslow and Watsco filed a motion in district court requesting relief from judgment pursuant to Fed. R. Civ. P. 60(b)(6). While that motion was still pending, Winslow and Watsco filed a petition for certiorari in this Court on February 14, 1985, which was subsequently denied on January 4, 1985. *Winslow Mfg. v. Kain*, No. 84-1117.

On May 24, 1985, the trial court granted Winslow and Watsco's motion for relief from judgment. In a carefully written opinion, it ruled that j.n.o.v. *had* been "warranted" following the first jury trial, and that the Tenth Circuit Court of Appeals had misinterpreted its comments on the evidence, thus creating a "manifest injustice" by nullifying the jury's verdict for Winslow and Watsco in the second trial.

> The Court finds that clarification of its November 13, 1981 Order in this case is necessary in light of the Tenth Circuit's misinterpretation of that Order. The Tenth Circuit read the phrase "judgment notwithstanding the verdict is unwarranted" to mean that this Court had found the standards for judgment

notwithstanding the verdict to have been unsatisfied. That was not the Court's finding or intention.

The Court currently has a distinct fresh recollection of its intent in issuing the November 13, 1981 Order which it authored. The Court meant that the remedy of directing a verdict was, in the sound exercise of the Court's discretion, unwarranted, not that the motion for judgment notwithstanding the verdict could not properly be granted. A close reading of the November 13, 1981 Order demonstrates that the Court's intent at that time was to merely grant Winslow a new trial even though the more extreme remedy of directing a verdict in Winslow's favor may also have been appropriate. While the precise language used by the Court may, when taken out of context, seem to indicate otherwise, a careful perusal of the entire Order makes the Court's intent evident. Thus, the Court shall grant Winslow's Rule 60 motion and clarify the Court's November 13, 1981 Order to show that the Court's intent at that time was to only grant Winslow a new trial although the more extreme action of granting the motion for j.n.o.v. and directing a verdict for Winslow would also have been proper. Any language in that Order apparently to the contrary was simply careless wording by the Court and should not be read out of context as indicative of a contrary intent.

The remainder of the trial court's memorandum opinion on this issue is contained in Appendix "B."

The trial court refused, however, to enter judgment in favor of Winslow and Watsco, reasoning that such action would contravene the Tenth Circuit mandate.

Winslow and Watsco moved for reconsideration on this issue, asserting that once a jurisdictional defect identified by the court of appeals is cured on remand to district court, judgment may be entered without the necessity of further appeal. *See Finn v. American Fire & Casualty Co.*, 347 U.S. 912 (1954); *Alderman v. Elgin, J & E Ry. Co.*, 125 F.2d 971 (7th Cir. 1942).

The motion for reconsideration was denied by the trial court on August 22, 1985. Winslow and Watsco filed a Notice of Appeal to the Tenth Circuit Court of Appeals on September 18, 1985. Kain filed a cross-appeal on September 24, 1985.

On October 9, 1985, Winslow and Watsco filed a Motion to Recall the Mandate in connection with its appeal, requesting that the court of appeals recall and modify its previous mandate in light of the misinterpretation identified by the trial court in granting defendants' Rule 60(b)(6) motion.

On March 10, 1986, the Clerk of the Tenth Circuit issued an Order denying Winslow and Watsco's motion to recall the mandate, stating that whether j.n.o.v. was "warranted" had been "implicitly" decided in the previous appeal, thus becoming the law of the case. Without addressing the manifest injustice exposed by the trial court, the Clerk's Order concluded that petitioners' motion to recall the mandate "must be denied." Thereafter, the court of appeals entered judgment dismissing the appeal and Kain's cross-appeal on May 20, 1986.

Winslow and Watsco petitioned for rehearing on June 4, 1986, which was denied as untimely by the court of appeals on July 16, 1986.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT HAS APPLIED THE LAW OF THE CASE DOCTRINE IN A MANNER CONTRARY TO ITS OWN PRECEDENTS AND THE HOLDINGS OF THIS COURT, THUS ALLOWING THE MANIFEST INJUSTICE IDENTIFIED BY THE TRIAL COURT TO STAND UNCORRECTED, CONTRARY TO THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDING MANDATED BY FEDERAL RULE 60(b).

Petitioners must concede that the issue presented herein involves no landmark opportunity to address the broad social policies presented in other cases before this Court. The issue presented here is certainly of grave importance, however, to all practitioners under the federal rules. Where a court of appeals undertakes to interpret remarks made by the district court, is there no remedy for a misinterpretation expressly identified by the district court that authored the remarks? And, if the district court grants relief under Fed. R. Civ. P. 60(b)(6) in order to clarify his remarks and to expose the "manifest injustice" created by the misinterpretation of the court of appeals, is there still no remedy simply because the injustice is already the "law of the case" by virtue of the misinterpretation contained in the first appeal?

The Tenth Circuit has embarked on a wide departure from the normal course of judicial review envisioned by the drafters of the federal rules by anointing the doctrine of law of the case as the superior consideration over and above the "manifest injustice" described by the trial court in granting a clarification of his remarks under Rule 60(b). By allowing the conceded injustice to stand un-

corrected, the court below has turned its back to the real world of litigation—that circumstances *can* change, misinterpretations *do* occur, and Rule 60(b) relief *must* be available to assure the opportunity to achieve a just result.

In *Kain v. Winslow Mfg.*, 736 F.2d 606 (10th Cir. 1984), *cert. denied*, ... U.S. ....., 105 S. Ct. 1360 (1985) the court of appeals vacated the jury verdict in favor of defendants Winslow and Watsco, and ordered the reentry of the earlier judgment against the defendants in the amount of $72,372.00 actual damages and $150,000.00 punitive damages. The Tenth Circuit based this drastic action upon the 1957 split decision of the District of Columbia Circuit Court of Appeals in *Jackson v. Wilson Trucking Corp.*, 243 F.2d 212 (D.C. Cir. 1957). In that case, the majority held that upon a motion for judgment notwithstanding the verdict under Fed. R. Civ. P. 50(b), the trial court has no authority to order a new trial as lesser relief unless it also finds that j.n.o.v. was "warranted," even though denied for the purpose of granting a new trial.[2]

The danger of this artificial and self-contradictory standard devised by the *Jackson* court is demonstrated by the present posture of this case. How can an appellate court determine whether a district court correctly believed that j.n.o.v. would have been "warranted" if the same court ultimately denied j.n.o.v. and awarded the new trial instead? Indeed, a superficial review of any such de-

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2. The holding in *Jackson* conflicts with the plain meaning of the language of Rule 50. *See* quotation in footnote 1. Such a quiet revision has caused a particular injustice here since the trial court had no prior warning of its existence and was not afforded the opportunity by the court of appeals to apply the *Jackson* standard once it was adopted as the law of the Tenth Circuit for the first time in this case.

cision will understandably result in a conclusion that j.n.o.v. was denied because it was "unwarranted."

At the very least, if such a standard is to be applied, one would expect the appellate court to examine the substance of the trial court's opinion as opposed to relying only upon the terminology used by the trial court when granting a new trial.

Elevating form over substance, the Tenth Circuit here ignored the trial court's holding that:

> The evidence shows that . . . Winslow and Watsco did not knowingly assist Peel's in practicing unfair competition against plaintiff.

Memorandum and Order of November 13, 1981, p. 5.

Instead of examining the trial court's detailed assessments of the absence of any evidence linking Winslow and Watsco with Peel's' unfair competition, the court of appeals simply decided that because the trial court had failed to overtly state that the entry of j.n.o.v. was warranted, it had no jurisdiction to order a new trial.

Upon remand to the trial court, Senior Judge Franklin Theis, who had presided at both trials, expressed his shock that the Tenth Circuit had so blatantly misinterpreted his Order granting defendants a new trial. In granting defendants' motion for relief from judgment, Judge Theis corrected the Tenth Circuit's misinterpretation of his remarks made when granting Winslow and Watsco a new trial, wherein he had commented that "judgment notwithstanding the verdict is unwarranted."

> Winslow asks this Court to clarify its November 13, 1981 order specifically as to what the Court intended when it said that "judgment notwithstanding the ver-

dict is unwarranted." Dk. No. 120, p. 3. Winslow desires the Court to explain whether the Court meant that judgment notwithstanding the verdict could not be granted because the standards for judgment notwithstanding the verdict or j.n.o.v. under Rule 50 had not been satisfied or rather, that judgment notwithstanding the verdict could have been granted but that the Court was exercising its discretion to merely order a new trial instead of the harsher remedy of directing judgment in favor of Winslow. Thus Winslow's Rule 60 motion goes to the issue of whether the standards for judgment notwithstanding the verdict had been satisfied.

This issue was never addressed by the Tenth Circuit. The Tenth Circuit assumed that the trial court had actually found the standards for judgment notwithstanding the verdict had not been met without deciding, explicitly or implicitly, that such a finding was proper. *See Kain*, 736 F.2d, at 608-09. Therefore, the Court is empowered to decide whether the clarification requested by Winslow is appropriate.

The Court finds that clarification of its November 13, 1981 order in this case is necessary in light of the Tenth Circuit's misinterpretation of that order. The Tenth Circuit read the phrase "judgment notwithstanding the verdict is unwarranted" to mean that this Court had found the standards for judgment notwithstanding the verdict to have been unsatisfied. That was not the Court's finding or intention.

Judge Theis concluded that:

Winslow's motion for clarification was meritorious and the Court has made the requested clarification.

> In light of this Court's clarification of the November 13, 1981 order, the mandate of the Tenth Circuit may be seen as working a manifest injustice.

See Appendix B, Trial Court's Order Granting Relief from Judgment, pp. A17-A19.

The Tenth Circuit, however, subsequently ignored the obvious injustice created by its erroneous interpretation of Judge Theis' denial of j.n.o.v., and refused any relief, relying on its "implicit" holding that j.n.c.v. could not have been granted by the trial court.

> In short, the district court's denial of judgment n.o.v. was essential to our holding and, as such, was implicitly affirmed on appeal. It cannot subsequently be modified by the court below. Accordingly, Winslow's motion [to recall the mandate] must be denied.

See Appendix C, Order on Motion to Recall Mandate, p. A23.

Here the court of appeals has turned the issue on its head. Judge Theis did not modify the holding of the Tenth Circuit. To the contrary, Judge Theis properly identified the Tenth Circuit's gross misinterpretation of his remarks in denying j.n.o.v. and suggested that the resulting manifest injustice should be corrected by the court of appeals. It was the court of appeals, not the district court, that unjustifiably altered the proper result by relying on its own erroneous interpretation of the trial court's reasons for granting a new trial. To say that *Winslow's* motion to correct a manifest injustice "must be denied" because the issue was "implicitly" addressed in the first appeal is repugnant to the fundamental responsibility of all federal courts to strive to achieve a just result.

> [A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been

> doing has been turned through changing circumstances into an instrument of wrong.

Kodekey Electronics, Inc. v. Mechanex Corp., 500 F.2d 110, 113 (10th Cir. 1974) [quoting *United States v. S.W. Pacific & Co.*, 286 U.S. 106, 114 (1932)].

The doctrine known as "Law of the Case" is a salutary theory to discourage repeated appeals of identical issues, but it was never meant to be thoughtlessly applied in a mechanical fashion, handcuffing an appellate court from correcting a clear error or to prevent a manifest injustice. As explained by Justice Holmes, the law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not to limit their power." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). Professor Moore describes the doctrine as "a heavy deterrent to vacillation on arguable issues, but not designed to prevent the correction of plain error or injustice." 1B J. Moore, *Moore's Federal Practice*, ¶ 0.404[i], p. 124.

Indeed, case law of the Tenth Circuit encourages district courts to be responsive to Rule 60(b) motions so that errors can be corrected even after the case has been decided by the court of appeals. Flexibility of the law of the case doctrine is obviously essential to the intended operation of Rule 60(b) to mend clear errors.

> Under the law the district court retains the power to act on a Rule 60(b), motion after this Court has resolved a matter upon appeal, and there is no necessity that a petition requesting permission to exercise such authority be filed with this Court. Thus, treated as a Rule 60(b) motion, the trial court has authority to reopen this matter.

Prop-Jets v. Chandler, 575 F.2d 1322, 1325 (10th Cir. 1978) [citing *Standard Oil Co. v. United States*, 429 U.S. 17 (1916); *Wilkin v. Sunbeam Corp.*, 405 F.2d 165 (10th Cir. 1968)].

The Tenth Circuit plainly erred by invoking the law of the case doctrine as a bar to resolving the manifest injustice expressly identified by Judge Theis. The court below should have passed upon the merits of the appeal and acknowledged its previous misinterpretation of Judge Theis' new trial order. By turning its back to this misinterpretation, a judgment for $72,372.00 in actual damages and $150,000 in punitive damages will be allowed to stand against defendants Winslow and Watsco, whom the second jury found to be free of any liability and whom the trial court also found to have committed no wrong.

Judge Theis recognized this perverse result to be a "manifest injustice." This Court should grant certiorari to allow an opportunity for this injustice to be corrected and to correct the Tenth Circuit's decision which eviscerates any avenue for relief under Rule 60(b) and directly contradicts the rulings of this Court and all circuit courts of appeals which give proper latitude to the doctrine of law of the case where a manifest injustice must be addressed.

CONCLUSION

Judge Theis has granted Winslow and Watsco's motion for relief from judgment under Fed. R. Civ. P. 60 (b) (6), holding that j.n.o.v. *was* "warranted," even though denied under the circumstances in favor of granting the lesser relief of new trial. Thus, in accordance with the

Tenth Circuit's adoption of the *Jackson* rule, jurisdiction did exist for the grant of a new trial, which ended in a jury verdict for Winslow and Watsco.

Yet, the Tenth Circuit, contrary to its own precedents and the precedents of this Court, has ruled below that where Rule 60 relief exposes a "manifest injustice" no remedy exists even where the law of the case is founded directly upon the same injustice. This holding nullifies the highest purpose of Rule 60—that a court of appeals must have the flexibility "to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong." *United States v. S.W. Pacific & Co.*, 286 U.S. 106, 114 (1932).

The instrument of wrong in this case is manifest and undeniable. The Tenth Circuit threw out a defense verdict based upon its misinterpretation of the trial court's remarks in granting a new trial. The trial court has forthrightly exposed the misinterpretation and has brought to the attention of the court of appeals that a "manifest injustice" would occur if the Tenth Circuit's mandate is allowed to stand. If uncorrected, Winslow and Watsco must pay a judgment, including punitive damages, of hundreds of thousands of dollars, despite the verdict of the second jury in favor of these defendants and the trial court's finding following the first trial that the evidence conclusively showed that "Winslow and Watsco did not knowingly assist Peel's in practicing unfair competition against plaintiff."

The opportunity under Fed. R. Civ. P. 60(b) to correct manifest injustice is of critical importance to all litigants in federal courts. Hanging in the balance here is the threat of repeated failures of justice in other lower

courts, in the same manner as was developed in this case, where a senior federal district court judge and experienced federal litigators presented through Rule 60(b) an injustice of misinterpretation to the court of appeals, only to be perfunctorily denied the proper relief because the injustice itself is the law of the case. Any wooden restrictions clothed in the guise of law of the case or any other restrictive doctrine must not be allowed to subvert the design of the federal rules to accomplish a just result in every case. This Court should grant certiorari in order to remedy the manifest injustice in this case and to provide guidance to the Tenth Circuit and other circuits in accommodating Rule 60 relief in circumstances where a just result is at stake.

For all the foregoing reasons, a writ of certiorari should be issued to review the decision below of the Tenth Circuit Court of Appeals.

Respectfully submitted,

GERRIT H. WORMHOUDT
(Counsel of Record)
THOMAS D. KITCH
JOHN E. COWLES
FLEESON, GOOING, COULSON & KITCH
Sixteenth Floor, 125 North Market
P.O. Box 997
Wichita, Kansas 67201-0997
316-267-7361
Attorneys for Petitioners

APPENDIX A

Philip KAIN, d/b/a Brock-Kain Company,
Plaintiff-Appellant,

v.

WINSLOW MANUFACTURING, INC., and Watsco, Inc.,
Defendants-Appellees.

No. 82-1300.

United States Court of Appeals,
Tenth Circuit.

May 31, 1984.

Gerald Sawatzky, Wichita, Kan. (Malcolm Miller and James D. Oliver of Foulston, Siefkin, Powers & Eberhardt, Wichita, Kan., with him on brief), for plaintiff-appellant.

Gerrit H. Wormhoudt, Wichita, Kan. (Thomas D. Kitch and Susan P. Selvidge of Fleeson, Gooing, Coulson & Kitch, Wichita, Kan., with him on brief), for defendants-Appellees.

Before McWILLIAMS and SEYMOUR, Circuit Judges, and BROWN,* District Judge.

McWILLIAMS, Circuit Judge.

Philip Kain, doing business at Brock-Kain Company, was a wholesale distributor of bulk liquid hair spray and shampoo, which he sold to beauty salons in Wichita, Kansas. Kain brought suit against Peel's Friendly Supply, Inc., another wholesale distributor of hair spray and related products in Kansas. Joined as a party defendant was

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*Honorable Wesley E. Brown, United States District Judge for the District of Kansas, sitting by designation.

Winslow Manufacturing, Inc., described as a subsidiary and alter ego of Watsco, Inc. Winslow was a Florida corporation engaged in the manufacture of liquid hair spray and hair spray equipment. The complaint alleged violations of § 1 of the Sherman Act and of the Robinson-Patman Act, together with the business tort of unfair competition. Trial by jury culminated in a verdict in favor of plaintiff Kain against both defendants, i.e., Peel and Winslow. Actual damages were fixed by the jury at $144,744 and punitive damages were awarded in the amount of $250,000. By answers to special interrogatories, the jury found no anti-trust violation on the part of the defendants, but did find that Peel had engaged in unfair competition and that Winslow had knowingly assisted Peel in its efforts.

Judgments were entered on the jury's verdict on October 7, 1980. Thereafter, Peel timely filed a motion for judgment notwithstanding the verdict, and incorporated therein an alternative request for a new trial. Winslow also timely filed a motion for judgment notwithstanding the verdict, but, unlike Peel, did not incorporate a motion for a new trial. And therein lies our present problem.

The trial court held a hearing on defendants' post-trial motions on May 15, 1981. On November 13, 1981, the district court issued a written order denying Peel's motion for judgment notwithstanding the verdict and also denying its request for a new trial, although the court did reduce the punitive damage award against Peel from $250,000 to $100,000. At the same time, the district court specifically denied Winslow's motion for judgment notwithstanding the verdict, commenting in connection therewith that "a judgment notwithstanding the verdict is unwarranted." The district court then proceeded to grant Winslow's motion for a new trial. Winslow, however, had not ever filed

such a motion. Finding that the verdict against Winslow was contrary to the weight of the evidence, the court ordered a new trial on the issue of Winslow's liability, i.e., whether Winslow knowingly assisted Peel's unfair competition with plaintiff.

Retrial of Winslow's liability resulted in a jury verdict in favor of Winslow. Kain then filed a notice of appeal from the judgment entered in favor of Winslow on the second trial of this matter, said notice of appeal specifically noting that Kain, *inter alia,* was appealing the district court's November 13, 1981 order of a new trial. In this connection, Kain argues that, under the circumstances, the district court lacked jurisdiction to order a new trial as to defendant Winslow, and that the judgment entered in favor of Winslow after the second trial should be set aside and the earlier judgment reinstated. We agree.

As indicated, Winslow did not file a motion for new trial as is permitted by Fed.R.Civ.P. 59. Rule 59(d) authorizes a district court to order a new trial on its own initiative for any reason for which it might have granted a new trial on motion of a party, but limits this authority by requiring such action to be taken within ten days after entry of judgment. Here the order of the district court granting Winslow a new trial was filed about thirteen months after entry of judgment. Hence, under Rule 59(d), the district court's action was unauthorized. *Tarlton v. Exxon,* 688 F.2d 973 (5th Cir.1982), *cert. denied sub nom. Diamond M. Drilling Corp. v. Tarlton,* ..... U.S. ....., 103 S.Ct. 3536, 77 L.Ed.2d 1387 (1983); *Peterman v. Chicago, Rock Island & Pacific Railroad Co.,* 493 F.2d 88 (8th Cir. 1974), *cert. denied,* 417 U.S. 947, 94 S.Ct. 3072, 41 L.Ed.2d 667 (1975); *Kanatser v. Chrysler Corp.,* 199 F.2d 610 (10th Cir.1952), *cert. denied,* 344 U.S. 921, 73 S.Ct. 388, 97 L.Ed.

710 (1953). Judge Murrah once explained the policy reasons behind the rule:

> There is good reason for thus confining the trial court within the narrow limits of its discretionary powers, for it is important in the administration of justice that there shall be an end to litigation, and that issues tried and decided by a jury shall not be lightly set aside. If a case is to be retried, it should be done with dispatch, lest the error of delay outweigh the error of trial.

Kanatser, 199 F.2d at 615.

Having elected not to file a motion for a new trial under rule 59, Winslow necessarily must rely entirely on Fed.R.Civ.P. 50 as authority for the district court's order granting it a new trial. Such reliance is misplaced, for neither the rule itself nor the authorities considering the rule permit the interpretation argued for here by Winslow.

First, rule 50(b) permits a motion for a new trial to be joined with a motion for judgment notwithstanding the verdict and also provides that a new trial may be prayed for alternatively in the party's motion for a judgment notwithstanding the verdict. Rule 50(b) then states that if a verdict has been returned, the district court has alternative courses of action: 1) it may allow the judgment to stand; or, 2) it may reopen the judgment and either order a new trial or direct the entry of judgment as if the earlier request for a directed verdict had been granted. The language in the second alternative has been interpreted to mean that where a district court concludes that a motion for judgment notwithstanding the verdict should be granted, the court is not required to grant the ultimate in relief; it may order relief in the form of a new trial. *Cone*

v. West Virginia Paper Co., 330 U.S. 212, 216 (1947). At the same time, however, courts have held that where a district court concludes that a motion for judgment notwithstanding the verdict must be, as it was in the instant case, denied, then the district court is without authority under rule 50(b) to order a new trial. *See, e.g., Peterman v. Chicago, Rock Island & Pacific Railroad Co.*, 493 F.2d 88 (8th Cir.1974), *cert. denied*, 417 U.S. 947, 94 S.Ct. 3072, 41 L.Ed.2d 667 (1975); *Jackson v. Wilson Trucking Corp.*, 243 F.2d 212 (D.C.Cir.1957).[1] *See also*, 9 Wright & Miller, *Federal Practice & Procedure* § 2538 (1971), where the following pertinent comment appears:

> It should be noted very carefully that the discretion to order a new trial spoken of in this section exists only if the moving party would be entitled to judgment notwithstanding the verdict. If that motion must be denied, the court has no power to order a new trial in favor of the moving party, except under the conditions specified in Rule 59(d), unless a motion for a new trial has been joined in the auternative with the motion for judgment.

Application of the foregoing principles to the instant case leads us to conclude that the district court was without jurisdiction to order a new trial. Winslow did not

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1. We recognize that there is a minority view on this matter. Circuit Judge Burger (now Chief Justice) dissented in *Jackson*, vigorously arguing that a trial court's power to grant a new trial should not be "artificially limited" to cases where judgment notwithstanding the verdict could have been granted. 243 F.2d at 217. Judge Burger urged that where a motion for judgment notwithstanding the verdict is timely made, the trial court should have the discretion to grant a new trial if it finds the evidence is contrary to the verdict. *Id.* at 218. This more flexible approach has also been advocated by several commentators, including Professor Moore. *See* 5A J. Moore, *Moore's Federal Practice*, ¶ 50.11, at 50-99 (2d ed. 1982); 71 Harv.L.Rev. 552 (1958); 33 Notre Dame Law, 126 (1957); 5 UCLA L.Rev. 154 (1957).

file a motion for new trial under rule 59, nor did it join with its motion for judgment notwithstanding the verdict a motion for a new trial, as is permitted by rule 50(b). The district court did not grant a new trial *sua sponte* within the time limitation set forth in rule 59(d), nor did it rule that Winslow's motion for judgment notwithstanding the verdict was well taken and proper. To the contrary, the district court concluded that such motion was "unwarranted" and the motion was specifically denied. Under such circumstances, the district court was powerless to order a new trial, and its order exceeded its authority and jurisdiction.

Alternatively, Winslow argues that Kain is somehow estopped from challenging in this court the authority of the district court to order a new trial. We do not agree. We are concerned here with the jurisdiction, or the authority, of a trial court to enter a particular order. Jurisdiction of a trial court can be challenged at any time, *Citizens Concerned for Separation of Church and State v. City and County of Denver,* 628 F.2d 1289, 1297 (10th Cir. 1980), *cert. denied,* 452 U.S. 963, 101 S.Ct. 3114, 69 L.Ed.2d 975 (1981), and the parties by their action, or inaction, cannot confer jurisdiction where none exists. *First State Bank and Trust Company v. Sand Springs State Bank,* 528 F.2d 350, 354 (10th Cir.1976). The fact that Kain participated in the second trial of this case does not foreclose it from challenging in this appeal the authority of the district court in the first instance to order a second trial. *See National Farmers Union Auto. & Cas. Co. v. Wood,* 207 F.2d 659 (10th Cir.1953); *Marshall's U.S. Auto Supply v. Cashman,* 111 F.2d 140 (10th Cir.1940).

Judgment reversed and cause remanded with direction that the district court vacate its judgment of March

22, 1982, and then reinstate and reenter its judgment of October 7, 1980, as such relates to Winslow.

WESLEY E. BROWN, District Judge, sitting by designation, dissenting.

I respectfully dissent. I would hold that the trial judge, in the interest of justice, may consider the motion for judgment n.o.v. to encompass the lesser motion for a new trial.

APPENDIX B

(Filed May 24, 1985)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

CIVIL ACTION No. 76-23-C6

PHILIP KAIN d/b/a BROCK-KAIN COMPANY,
Plaintiff,

v.

WINSLOW MANUFACTURING, INC., & WATSCO, INC.,
Defendants.

OPINION AND ORDER

This case involving claims of unfair competition and violations of federal antitrust law is currently before the Court on a motion by Winslow Manufacturing, Inc. [Winslow] and Watsco, Inc. under Rule 60 of the Federal Rules of Civil Procedure for clarification and relief from judgment. The Court has carefully read and considered the briefs submitted by the parties and has had the benefit of oral argument on this motion and is now prepared to rule.

This case was first tried to a jury in September of 1980. On October 7, 1980, the jury found against plaintiff Philip Kain d/b/a Brock-Kain Company [Kain] on his antitrust claims. Dk. No. 95. However, the jury found in favor of Kain on his unfair competition claims as against the defendants Winslow, Watsco, Inc., and Peel's Friendly Supply, Inc. [Peel] and awarded $144,744 in actual damages and $250,000 in punitive damages as against

all three defendants. Dk. No. 94. Judgment was entered on October 7, 1980 on that verdict. Dk. No. 95. The jury also found Watsco, Inc. to be the alter ego of Winslow. *See* Dk. No. 105, Question #3. They have been treated as one entity since that time and are referred to simply as "Winslow" throughout this opinion.

In an order filed November 13, 1981, the Court granted Winslow a new trial but denied Peel's motion for j.n.o.v. and for a new trial. Dk. No. 120. The Court did, however, grant Peel a remittitur, reducing the punitive damage award against Peel, the only defendant remaining liable on the jury's verdict, from $250,000 to $100,000. *Id.* This remittitur was accepted by Kain on February 1, 1982. Dk. No. 126. On February 26, 1982, Kain and Peel entered into a settlement agreement whereby Peel paid Kain $115,000 as a "full and complete settleme of all matters heretofore in dispute between them, which were or which could have been asserted in Case No. 76-23-C6 in the United States District Court for the District of Kansas." Dk. No. 166, Ex. 1, ¶5. The settlement also provided that the sum received from Peel by Kain would first be applied in settlement of one-half of Kain's judgment for actual damages and the remainder against Peel's liability for punitive damages.

In March of 1982, a new trial was held on Kain's claims against Winslow. On February 12, 1982, the jury returned a verdict in favor of Winslow on all counts. Dk. Nos. 135, 136. Judgment was entered on this verdict on March 22, 1982. Dk. No. 144. In the following appeal, Kain apparently argued, for the first time, that this Court was without jurisdiction to order a new trial as to Winslow. The United States Court of Appeals for the Tenth Circuit agreed, and reversed and remanded the case with direc-

tions to vacate the judgment of the second trial and reinstate the judgment of the first trial as it relates to Winslow. *Kain v. Winslow Mfg., Inc.*, 736 F.2d 606, 609 (1984). The Rule 60(b) motion by Winslow seeks to have this Court clarify the Court's order of November 13, 1981 and to determine how the Peel's settlement with Kain will affect the amount of the jury's damage award to be assessed against Winslow.

I. Allocation of the Amount of Peel's Settlement with Kain.

The parties have submitted several methods by which each feels the amount of Peel's settlement with Kain should be credited to the judgment returned against Winslow which the Tenth Circuit has ordered reinstated. Kain advocates a method that would result in Winslow being liable for about $346,000 plus interest. In sharp contrast, Winslow's favorite method of computation results in a liability of only $29,000 plus interest. Other methods of computation have also been proposed by the parties resulting in liabilities somewhere between these two extremes. The differences in these methods result, in part, from differing views as to the effect of the remittitur on punitive damages accepted by Kain and of the Tenth Circuit's mandate in this case. However, none of the methods proposed by the parties give proper effect to the remittitur accepted by Kain, and the settlement agreement between Kain and Peel.

The amount of actual damages that Peel and Kain should each be held liable for is controlled by the law of contribution. The Kansas comparative negligence statute, K.S.A. 60-258a, does not apply because the tort claim in this case, unfair competition, is an intentional tort.

See Sieben v. Sieben, 231 Kan. 372, 378 (1982) (K.S.A. 60-258a does not apply to intentional torts); Restatement of Torts, §§762-774 (1939) (unfair competition is essentially an intentional tort).

Kansas does not generally recognize a right of contribution between joint tort-feasors. *Alseike v. Miller*, 196 Kan. 547 (1966). However, K.S.A. 60-2413(b) creates a right of contribution between joint judgment debtors which applies when a joint judgment is entered in an action founded in tort. *See McKinney, Administrator v. Miller*, 204 Kan. 436 (1970). Thus, Peel and Winslow should each be liable for one-half of the judgment for actual damages. *See Brown v. Keill*, 224 Kan. 195, 198 (1978).

The settlement agreement between Kain and Peel reflects the parties' belief that Peel was liable for one-half of the amount of actual damages assessed. The agreement provides that the sum paid by Peel would first be applied against one-half of Kain's judgment for actual damages. Dk. No. 166, Ex. 1, ¶4. Thus, the parties intended that the settlement would be in satisfaction of one-half of the amount of actual damages. Winslow remains liable for the remaining unsatisfied one-half of Kain's October 7, 1980 judgment for actual damages.

The issue of what portion of the punitive damage award Winslow should be held liable for is more troublesome. Strictly applied, K.S.A. 60-2413(b) would provide a right of contribution to any joint judgment debtors; no exception is made for joint debtors of punitive damage judgments. *See* K.S.A. 60-2413(b) ("A right of contribution or indemnity among judgment debtors . . . ."). However, a right of contribution between joint debtors of a punitive damage award would seem to conflict with the purposes underlying punitive damages; to punish a

defendant for malicious or willful invasions of another's rights in order to restrain him and deter others like him from the commission of similar wrongs. *See, e.g., Woodersen v. Ortho Pharmaceutical Corp.*, 235 Kan. 387, 415-16 (1984). However, the Court need not decide this issue because the Court finds that Kain, Peel and Winslow have acquiesced in an allocation of punitive damages between Winslow and Peel and are all estopped from asserting that the punitive damage award should be allocated differently.

The jury in the first trial returned an award of $250,000 punitive damages against both Peel and Winslow. Parenthetically the Court notes that the jury was not asked to make a separate punitive damage award as to each defendant, as is generally the practice today. *See, e.g.,* Devitt and Blackmar, *Federal Jury Practice and Instructions* §85.12 (1977) (form of general verdict on plaintiff's claims for both actual and punitive damages). *But see Sieben v. Sieben,* 231 Kan. 372, 379 (1982) (apparently holding that a jury may not apportion punitive damage awards among multiple defendants in intentional tort cases although unclear that the issue was directly before the court). The Court, when it granted a new trial to Winslow, entered a remittitur reducing the punitive damage award remaining against Peel to $100,000. In so doing, the Court reasoned that:

> It seems a safe assumption based on the size of the verdict for punitive damages, that substantial misconduct as well as a substantial part of the punitive damages may have been attributed to defendants Winslow and Watsco, based on the evidence of Watsco's financial affluence. Therefore, the Court believes that fundamental fairness requires the Court to strike

> down that part of the punitive award which may have been imposed on the defendants Winslow and Watsco under the evidence . . . .

Dk. No. 120, p. 8-9. In effect, the Court's remittitur decided that had the jury allocated the punitive damage award between the defendants, it would have assessed $100,000 against Peel and the remaining $150,000 against Winslow.

Kain accepted the remittitur of the amount of punitive damages against Peel and soon after settled with Peel. The settlement agreement provides that the sum paid by Peel was taken in satisfaction for the punitive damage liability of Peel as well as Peel's share of the actual damages. Specifically, the settlement agreement provides that:

> WHEREAS, Kain, as plaintiff, recovered a judgment against Peel's in Case No. 76-23-C6 for actual damages of $144,744.00 *and punitive damages of $100,000.00* in Case No. 76-23-C6 in the United States District Court for the District of Kansas; and
>
> * * *
>
> THEREFORE, the parties agree to compromise and *settle all further claims and proceedings between them* on the following terms and conditions:
>
> * * *
>
> 4. Of the total amount received from Peel's by Kain, that sum shall first be applied and credited in settlement of one-half of Kain's judgment for actual damages, and the remainder shal be *applied in settlement of Peel's liability for punitive damages under the judgment.*

Dk. No. 166, Ex. 1 (emphasis added).

Kain is barred from challenging the remittitur as improper on appeal after having accepted it. *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 650 (1977). Kain should likewise be barred from now asserting that the punitive damage award was joint and several or that it should be allocated differently from the allocation implicit in the Court's remittitur.

Winslow is also barred from now challenging the Court's allocation of punitive damages. Winslow did not challenge on appeal the validity of this Court's allocation of punitive damages. That issue should have properly been raised by cross-appeal when the case was first appealed to the Tenth Circuit. Winslow acquiesced in this Court's allocation of punitive damages and will not be heard to now challenge that allocation. The Court therefore finds that Winslow is liable for $150,000 of the first jury's punitive damage award, the other $100,000 of the award having been allocated to Peel and satisfied through Peel's and Kain's settlement agreement.

A final issue as to the entry of judgment against Winslow is the appropriate rate of post-judgment interest. In 1980, the time of the judgment from the first trial, 28 U.S.C. §1961 provided that interest would run after a judgment was entered at the rate established by state law. While this case was pending on appeal, Congress amended §1961 by enacting the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, Title III, Part B, §302(a), 96 Stat. 55, to provide that effective October 1, 1982, interest on federal court judgments would be computed at the "coupon yield equivalent . . . of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to judgment." 28 U.S.C. §1961(a) (as amended in

1982). This 1982 amendment has been held not to apply to judgments entered prior to the effective date of the amendment. *See Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 746 F.2d 168, 174 (2d Cir. 1984); *Merit Insurance Co. v. Leatherby Insurance Co.*, 728 F.2d 943, 944 (7th Cir. 1984); *United States v. Dollar Rent a Car Systems, Inc.*, 712 F.2d 938, 940 n. 5 (4th Cir. 1983). Thus, the interest rate established by Kansas law applies. Kansas law provides that:

> Any judgment rendered by a court of this state on or after July 1, 1980, and before July 1, 1982, shall bear interest as follows: (1) On and after the day on which the judgment is rendered and before July 1, 1982, at the rate of 12% per annum; and (2) on and after July 1, 1982, at the rate of 15% per annum.

K.S.A. 16-204(b) (1984 Cumm. Supp.). Since Kain accepted a sum from Peel in satisfaction of *all* of Peel's liability on the October 7, 1980 judgment, it included not only Peel's liability for actual and punitive damages but also the liability for postjudgment interest accrued on Peel's portion of the actual and punitive damage awards. Therefore, Winslow is liable for postjudgment interest as computed by Kansas law only upon one-half of the actual damages and $150,000 of the award of punitive damages from the date of the entry of judgment on October 7, 1980.

II. Clarification of this Court's November 13, 1981 Order.

Winslow has requested the Court, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, to clarify its November 13, 1981 order in which the Court granted a new trial to Winslow. Winslow asks the Court to elucidate that order, particularly with respect to the comment

in the order that "judgment notwithstanding the verdict is unwarranted." Dk. No. 120, p. 3. The Court agrees that a clarification is necessary.

Rule 60 of the Federal Rules of Civil Procedure provides in relevant part that:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
>
> * * *
>
> (6) any other reason justifying relief from the operation of the judgment.

Fed.R.Civ.P. 60(b). Such a motion must be made within a reasonable time. *Id.* In determining what is a reasonable time, the Court must balance the interests in finality with the particular reasons for the delay and carefully scrutinize the particular circumstances of the case. *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 897 (2d Cir.), *cert. denied*, 104 S.Ct. 344 (1983). What constitutes a reasonable time is ultimately a matter for the sound discretion of the trial court. *Washington v. Penwell*, 700 F.2d 570, 573 (9th Cir. 1983).

In this case, Winslow filed the motion for clarification immediately following the issuance of the Tenth Circuit's mandate in this case but before petition for certiorari was filed with the United States Supreme Court. It was at this time when the need for clarification first became apparent. Winslow had no reason to file a motion for clarification before then. The reason for Winslow's delay in filing this motion outweighs the interests of finality in this case and therefore, the Court shall consider the Rule 60 motion by Winslow as timely.

The fact that the Tenth Circuit has already issued a mandate in this case does not strip this Court of authority to hear the Rule 60 motion. A federal district court need not seek leave of the appellate court before ruling upon a Rule 60 motion in a case which has been reviewed on appeal. *Standard Oil Co. of California v. United States,* 429 U.S. 17 (1976) (per curiam) (citing with approval *Wilkin v. Sunbeam Corp.,* 405 F.2d 165 (10th Cir. 1968)). However, the district court may only reach issues which the appellate court did not reach explicitly or implicitly in issuing its mandate. *Gray Panthers v. Schweiker,* 716 F.2d 23, 38 (D.C. Cir. 1983); *Liberty Mutual Insurance Co. v. EEOC,* 691 F.2d 438, 441 (9th Cir. 1982). In order to determine whether the issues raised in Winslow's Rule 60 motion were reached by the Tenth Circuit in issuing its mandate in this case, the Court must first look to the merits of Winslow's motion.

Winslow asks this Court to clarify its November 13, 1981 order specifically as to what the Court intended when it said that "judgment notwithstanding the verdict is unwarranted." Dk. No. 120, p. 3. Winslow desires the Court to explain whether the Court meant that judgment notwithstanding the verdict could not be granted because the standards for judgment notwithstanding the verdict or j.n.o.v. under Rule 50 had not been satisfied or rather, that judgment notwithstanding the verdict could have been granted but that the Court was exercising its discretion to merely order a new trial instead of the harsher remedy of directing judgment in favor of Winslow. Thus Winslow's Rule 60 motion goes to the issue of whether the standards for judgment notwithstanding the verdict had been satisfied.

This issue was never addressed by the Tenth Circuit. The Tenth Circuit assumed that the trial court had actually

found the standards for judgment notwithstanding the verdict had not been met without deciding, explicitly or implicitly, that such a finding was proper. *See Kain,* 736 F.2d, at 608-09. Therefore, the Court is empowered to decide whether the clarification requested by Winslow is appropriate.

The Court finds that clarification of its November 13, 1981 order in this case is necessary in light of the Tenth Circuit's misinterpretation of that order. The Tenth Circuit read the phrase "judgment notwithstanding the verdict is unwarranted" to mean that this Court had found the standards for judgment notwithstanding the verdict to have been unsatisfied. That was not the Court's finding or intention.

The Court currently has a distinct fresh recollection of its intent in issuing the November 13, 1981 order which it authored. The Court meant that the remedy of directing a verdict was, in the sound exercise of the Court's discretion, unwarranted, not that the motion for judgment notwithstanding the verdict could not properly be granted. A close reading of the November 13, 1981 order demonstrates that the Court's intent at that time was to merely grant Winslow a new trial even though the more extreme remedy of directing a verdict in Winslow's favor may also have been appropriate. While the precise language used by the Court may, when taken out of context, seem to indicate otherwise, a careful perusal of the entire order makes the Court's intent evident. Thus, the Court shall grant Winslow's Rule 60 motion and clarify the Court's November 13, 1981 order to show that the Court's intent at that time was to only grant Winslow a new trial although the more extreme action of granting the motion for j.n.o.v. and directing a verdict for Winslow would also

have been proper. Any language in that order apparently to the contrary was simply careless wording by the Court and should not be read out of context as indicative of a contrary intent.

While the Court can clarify its previous order, this Court has no power to relieve Winslow from the mandate of the Tenth Circuit in this case. This Court cannot alter or amend a mandate issued by a higher court. *Elias v. Ford Motor Co.*, 734 F.2d 463, 465 (1st Cir. 1984); *Dorsey v. Continental Gas Co.*, 730 F.2d 675, 678 (11th Cir. 1984); *Stamper v. Baskerville*, 724 F.2d 1106, 1107 (4th Cir. 1984); *Maggard v. O'Connell*, 703 F.2d 1284, 1289 (D.C. Cir. 1983); *Firth v. United States*, 554 F.2d 990, 993-94 (9th Cir. 1977). Nevertheless, Winslow's motion for clarification was meritorious and the Court has made the requested clarification. In light of this Court's clarification of the November 13, 1981 order, the mandate of the Tenth Circuit may be seen as working a manifest injustice. A party found by both the trial court and a second jury to have committed no wrongdoing is liable, by reason of the Tenth Circuit's mandate reinstating the first judgment, for $72,372 actual damages and $150,000 punitive damages plus interest. However, while this Court lacks authority to act to remedy this grave wrong in this instance, the Tenth Circuit is empowered to modify its own mandate to correct a manifest injustice. *United States v. Williams*, 728 F.2d 1402, 1405-06 (11th Cir. 1984); *Dickerson v. Auto Center Mfg. Co.*, 733 F.2d 1092, 1096 n. 3 (5th Cir. 1983); *United States v. Dann*, 706 F.2d 919, 923 (9th Cir. 1983), *rev'd and remanded on other grounds* 105 S.Ct. 1058 (1985). Therefore, the final decision of whether this unintended and procedural travesty of justice should lie uncorrected rests with the Tenth Circuit, not this Court.

IT IS THEREFORE ORDERED that Winslow is hereby liable for $72,372.00 actual damages and $150,000.00 punitive damages of the judgment entered in this case on October 8, 1980 with interest charged on those amounts from the date of judgment to June 30, 1982 at 12 percent per annum, and at 15 percent per annum thereafter, and the Clerk shall enter judgment accordingly.

IT IS FURTHER ORDERED that Winslow's motion for clarification is hereby granted in that the Court's order of November 13, 1981 is hereby clarified to more accurately reflect this Court's intent as more fully set forth above in this opinion.

At Wichita, Kansas, this 24th day of May, 1985.

/s/ Frank G. Theis
United States District Judge

APPENDIX C

JANUARY TERM - MARCH 10, 1986

Before Honorable Stephanie K. Seymour, Honorable Robert H. McWilliams, Circuit Judges, and Honorable Wesley E. Brown, United States District Judge.*

No. 82-1300

PHILLIP KAIN, d/b/a BROCK-KAIN CO.,
Plaintiff-Appellant,
v.
WINSLOW MANUFACTURING, INC., and
WATSCO, INC.,
Defendants-Appellees.

ORDER ON MOTION TO RECALL MANDATE

Our earlier opinion in this appeal appears as *Kain v. Winslow Manufacturing, Inc.*, 736 F.2d 606 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 1360 (1985). Winslow, the appellee, has filed a motion to recall the mandate, which issued on October 15, 1984. Pursuant to order of court, the parties have fully briefed the matter. For the reason set forth below, the motion to recall the mandate is denied.

In its order and judgment of November 13, 1981, the district court denied Winslow's motion for judgment notwithstanding the verdict, stating that "reasonable persons may reach different conclusions" on the evidence presented at the first trial of this case, so that a judgment n.o.v. in favor of Winslow "is unwarranted." *Kain v.*

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*Of the District of Kansas, sitting by designation.

Winslow Manufacturing, Inc., No. 76-23-C6, slip op. at 3 (D. Kan. Nov. 13, 1981) (Memorandum and Order Relative to Defendant's Post-Trial Motions). The court instead granted a new trial. On appeal, we held that the district court had no power to grant Winslow a new trial, having determined that judgment n.o.v. was "unwarranted." *Kain*, 736 F.2d at 609. We then reinstated the first trial.

After remand, Winslow filed in the district court a motion under Fed. R. Civ. P. 60 for relief from judgment and requested the district court to "clarify its opinion and order of November 13, 1981" and to state that a judgment n.o.v. in its favor in fact would have been appropriate. The district court granted the motion in order to correct what it viewed as an injustice. It issued an opinion stating that its original order granting Winslow a new trial had not resolved whether the standards for judgment n.o.v. had been satisfied. The court observed that it lacked the power to alter this panel's mandate in *Kain*, but assumed that our opinion had left this particular issue open on remand. The court then stated with respect to the November 13, 1981 order, that its

> "intent at that time was to only grant Winslow a new trial although the more extreme action of granting the motion for j.n.o.v. and directing a verdict for Winslow would also have been proper. Any language in that order apparently to the contrary was simply careless wording by the Court and should not be read out of context as indicative of a contrary intent."

Opinion and Order, May 24, 1985.

The district court correctly observed that it could escape the bar of the law of the case only with respect to

an issue not decided, either explicitly or by necessary implication, by our decision on appeal. *See Gray Panthers v. Schweiker,* 716 F.2d 23, 38 (D.C. Cir. 1983); *Liberty Mutual Insurance Co. v. EEOC,* 691 F.2d 438, 441 (9th Cir. 1982). However, we are constrained to disagree with the court's conclusion that this particular issue remained open. Our opinion in *Kain* states that, "the district court specifically denied Winslow's motion for judgment notwithstanding the verdict . . . [and] then proceeded to grant Winslow's motion for a new trial." 736 F.2d at 607. For this reason, we held "that where a district court concluded that a motion for judgment notwithstanding the verdict *must be, as it was in the instant case, denied,* then the district court is without authority under Rule 50(b) to order a new trial." *Id.* at 608 (emphasis added). In short, the district court's denial of judgment n.o.v. was essential to our holding and, as such, was implicitly affirmed on appeal. It cannot subsequently be modified by the court below. Accordingly, Winslow's motion must be denied.

/s/ Howard K. Phillips
Howard K. Phillips, Clerk

NO. 82-1300 - KAIN v. WINSLOW

Judge McWilliams specially concurs.

Although I am in general accord with the foregoing Order and Judgment, I would make the following comment.

In its order and judgment of November 13, 1981, the district judge denied Winslow's motion for judgment n.o.v., and, in so doing, stated that "reasonable persons may reach different conclusions" on the evidence presented

at the first trial of this case, to the end that a judgment n.o.v. in favor of Winslow "is unwarranted." Kain v. Winslow Manufacturing, Inc., No. 76-23-C6, slip op. at 3 (D. Kan. Nov. 13, 1981) (Memorandum and Order Relative to Defendant's Post-Trial Motions). It was on this basis that the appeal was presented to us, and in this regard we held that the district judge had no power or authority to grant Winslow a new trial, having determined that judgment n.o.v. was "unwarranted." Kain v. Winslow Manufacturing, Inc., 736 F.2d 606, 609 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 1360 (1985).

After remand, Winslow filed in the district court a motion under Fed. R. Civ. P. 60 for relief from judgment and requested the district court to "clarify its opinion and order of November 13, 1981." The district judge granted this motion and proceeded to "clarify" its earlier order in material particulars. Specifically, in his so-called "clarifying" order of May 24, 1985, the district judge stated, in effect, that Winslow's motion for judgment n.o.v. *was* warranted and could have been granted, but that he was opting for the lesser remedy of a new trial, vis-a-vis, judgment n.o.v. Kain v. Winslow Manufacturing, Inc., No. 76-23-C6, slip op. at 11-12 (D. Kan. May 24, 1985) (Opinion and Order). This is not a clarification, it is a fundamental change of the earlier order in which the motion for judgment n.o.v. was denied and characterized as "unwarranted." We hold that the district judge, under the circumstances, was powerless to materially change his earlier ruling.

In support of our holding and our denial of Winslow's motion to recall mandate, see such cases as: Briggs v. Pennsylvania Railroad Co., 334 U.S. 304, 306 (1947) ("an inferior court has no power or authority to deviate from the mandate issued by an appellate court."); Kodekey Elec-

tronics, Inc. v. Mechanex Corp., 500 F.2d 110, 113 (10th Cir. 1974) (a lower court under Fed. R. Civ. P. 60 may, in some circumstances, modify its original opinion after an appeal, but not "in a manner contrary to the result ordered by the court of appeals."); Collins v. City of Wichita, 254 F.2d 837, 839 (10th Cir. 1958) ("Litigation must end sometime, and the fact that a [trial] court may have made a mistake in the law when *entering* judgment, or that there may have been a judicial change in the [trial] court's view of the law *after its entry,* does not justify setting it aside.") (emphasis added). *See also* Elias v. Ford Motor Co., 734 F.2d 463, 465 (1st Cir. 1984) ("the district court . . . no longer had power to amend its judgment once we affirmed the judgment on appeal. A mandate is completely controlling as to all matters before the appellate court and disposed of by its decree."); Stiller v. Squeez-A-Purse Corp., 296 F.2d 504, 506 (6th Cir. 1961) ("Where we had affirmed directly and unequivocally the original judgment of the District Court, certiorari had been denied by the Supreme Court, and the cause had been remanded for procedure in compliance with our order, the District Court should not have undertaken to revise its original opinion in material aspects."); United States v. Cato Brothers, Inc., 273 F.2d 153, 157 (4th Cir. 1959), *cert. denied,* 362 U.S. 927 (1960) ("a lower court has no power or authority to deviate from the mandate issued by an appellate court but is bound thereby and cannot reopen questions which the mandate lays to rest.").

APPENDIX D

(Filed May 20, 1986)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 85-2403 & 85-2436
(D.C. No. 76-23-C6)
(D. Kan.)

PHILIP KAIN, d/b/a BROCK-KAIN CO.,
Plaintiff-Appellee
Cross-Appellant,

v.

WINSLOW MANUFACTURING, INC.; and
WATSCO, INC.,
Defendants-Appellants
Cross-Appellees.

ORDER AND JUDGMENT

Before SEYMOUR and McWILLIAMS, Circuit Judges.

In accordance with 10th Cir. R. 9(e) and Fed. R. App. P. 34(a), these appeals came on for consideration on the briefs and record on appeal.

These matters are before the court on plaintiff's alternative motion to dismiss or to affirm in No. 85-2403 and to dismiss in No. 85-2436. Defendants have responded to plaintiff's motion in No. 85-2403 and indicate no objection to the motion to dismiss in No. 85-2436.

By our disposition of defendants' motion to recall the mandate in No. 82-1300, it was intended that all matters underlying these appeals would also be decided. We

conclude that there is no longer a live controversy and that these appeals are moot.

The appeals are DISMISSED.

The mandates shall issue forthwith.

/s/ Robert L. Hoecker
Robert L. Hoecker, Clerk

Supreme Court, U.S.
FILED
AUG 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-258

In the Supreme Court of the United States

OCTOBER TERM, 1986

WINSLOW MANUFACTURING, INC.,
and WATSCO, INC.,
Defendants-Petitioners,

vs.

PHILLIP KAIN, d/b/a BROCK-KAIN,
Plaintiff-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

GERALD SAWATZKY
(Counsel of Record)
700 Fourth Financial Center
Wichita, Kansas 67202
Telephone: 316/267-6371
Attorney for Respondent

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTIONS PRESENTED

1. Does this Court lack jurisdiction under 28 U.S.C. Sec. 2101(c) when final judgment by the court of appeals denying the appellate relief sought, recall of a prior mandate, was entered March 10, 1986 (more than 90 days prior to filing of the present petition); and petitioners' petition for rehearing filed June 4, 1986, was denied as untimely?

2. In *Kain v. Winslow Mfg.*, 736 F.2d 606 (10th Cir. 1984), cert. denied, 105 S.Ct. 1360 (1985), the court of appeals ordered the district court to reinstate plaintiff's judgment on a jury verdict, after the district court had denied defendants' motion for judgment n.o.v. but had set aside the judgment by granting a new trial on its own motion thirteen months later, in violation of Rule 59(d), FRCP. Subsequently re-entering the judgment as ordered, the district court invited the court of appeals to recall its mandate on the spurious ground that the appellate court had "misinterpreted" the 1981 new trial order.

The question is whether the court of appeals properly denied defendants' motion to recall the earlier mandate when all issues now raised had already been argued and decided in the first appeal.

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OPINIONS BELOW

Attached in the Appendix to this brief is the order of the court of appeals entered July 16, 1986, denying as untimely the petitioners' June 4, 1986, petition for rehearing of the March 10, 1986, order denying recall of the first appellate mandate.

JURISDICTION

A substantial jurisdictional question exists because the dispositive final judgment was entered March 10, 1986, in the form of an order denying a recall of the mandate in the first appeal (No. 82-1300). Petitioners filed a petition for rehearing of that final order and judgment on June 4, 1986, long after the fourteen day period permitted by Rule 40, FRAP. The petition for rehearing was denied as untimely on July 16, 1986, and thus did not serve to extend the 90 day period prescribed by 28 U.S.C. Sec. 2101(c). *Bowman v. Loperena,* 311 U.S. 262, 266 (1940).

Although a later "Order and Judgment" formally dismissing the second appeal (No. 85-2403) as "moot" was entered May 20, 1986, the substantive relief sought by petitioners in the second appeal was the recall of the mandate in the first appeal, which substantive relief was denied by the final order issued March 10, 1986.

The "judgment" brought before this Court for review by petitioners is the March 10, 1986, judgment rejecting petitioners' motion to recall the first mandate, which motion petitioners had filed in the second appeal. Petitioners do not seek review of the May 20, 1986, judgment formally dismissing its second appeal as "moot" on the ground that the March 10, 1986, judgment denying recall of the mandate in the first appeal had disposed of the second appeal. Thus, the order dismissing for mootness did not extend time to review the March 10, 1986, judgment. Cf., *Federal Trade Commission v. Minneapolis-Honeywell Co.,* 344 U.S. 206, 211 (1952); *United States v. Adams,* 383 U.S. 39, 41-42 (1966).

STATUTE INVOLVED

28 U.S.C. Sec. 2101(c), governing the jurisdictional question, provides:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

STATEMENT OF THE CASE

On October 7, 1980, plaintiff Kain received judgment on a jury verdict assessing damages against defendants.

Within 10 days, petitioners filed a motion for judgment n.o.v. under Rule 50(b), but declined to join a motion for new trial under Rule 59, as expressly permitted by Rule 50(b).

More than thirteen months later, November 13, 1981, the district court denied the motion for judgment n.o.v. as "unwarranted" because "The evidence and inferences in this case are such that reasonable persons may reach different conclusions . . ."; but granted a new trial.

In *Kain v. Winslow Mfg.*, 736 F.2d 606 (10th Cir. 1984), cert. denied, 105 S.Ct. 1360 (1985), the court of appeals, following a uniform line of federal appellate cases, ordered the 1980 judgment reinstated because Rule 50(b) did not authorize the district court to grant trial on its own motion if a motion for judgment n.o.v. thereunder was unwarranted. This Court denied review of that issue.

After criticizing the appellate reversal, the district court re-entered judgment as required; but purported to sustain petitioners' motion under Rule 60(b) seeking to "clarify" the 1981 order already reviewed and reversed. The "clarification" was in fact a material change of the 1981 order, turning it from an order denying the motion for judgment n.o.v. and one holding the motion to be "unwarranted" because there was conflicting evidence, into a totally contrary order, one holding the motion to be "warranted" because there was no evidence to support the verdict.

Petitioners appealed to the court of appeals from the re-entry of the judgment against them (the second appeal, No. 85-2403), asking the court to recall its mandate in the first appeal, No. 82-1300. The issues were then briefed on petitioners' motion to recall the mandate.

On March 10, 1986, the court of appeals denied the motion to recall its mandate, correctly pointing out that the decision and judgment in the prior appeal had specifically, as well as implicitly, decided the very issues which petitioners later submitted to the district court and were now again relying on to avoid the 1980 judgment against them. (A21-A25).

As Judge McWilliams aptly stated concerning the district court's purported "clarifying" order issued in 1985 after the first appeal:

"This is not a clarification, it is a fundamental change of the earlier order in which the motion for judgment n.o.v. was denied and characterized as 'unwarranted.'" (A24).

Petitioners, moreover, had made the same arguments attempting to misconstrue the 1981 order, in the prior

appeal, all of which arguments had been rejected by the court of appeals. Respondent Kain, in the first appeal, had documented a vast amount of evidence sustaining the jury verdict, demonstrating that the district court 1981 denial of a motion for judgment n.o.v. was required, and must be affirmed. The court of appeals did affirm the denial of the motion for judgment n.o.v., as its March 10, 1986, order makes clear:

". . . we held 'that where a district court concluded that a motion for judgment notwithstanding the verdict *must be, as it was in the instant case, denied,* then the district court is without authority under Rule 50(b) to order a new trial.' . . . In short, the district court's denial of judgment n.o.v. was essential to our holding, and as such, was implicitly affirmed on appeal. It cannot subsequently be modified by the court below. Accordingly, Winslow's motion [to recall the first mandate] must be denied." (A23). (Emphasis by the court).

ARGUMENT

Petitioners' assertion that the court of appeals departed from "the accepted and usual course of judicial proceeding" is frivolous. It is unsupported by any fact or rule of law.

The truth is that the court of appeals was forced on two occasions to correct the district court's neglect and disregard of the legal limits on its own jurisdiction. In the 1981 order, the district court had denied petitioners' motion for judgment n.o.v. because there was conflicting evidence sufficient to sustain the verdict; but the district court erroneously assumed that petitioners had filed a motion for new trial as well, and purported to grant a

non-existent motion for new trial (equivalent to granting a new trial on his own motion thirteen months after judgment on the verdict in violation of Rule 59(d), FRCP).

On the first appeal, by respondent Kain, petitioners argued that the district court's 1981 order granting a new trial was proper, whether or not the motion for judgment n.o.v. under Rule 50(b) had been warranted; but that in any event the 1981 order had found that motion to be "warranted" despite its specific ruling that the motion was "unwarranted" because of conflicting evidence. Petitioners also argued that judgment n.o.v. was proper because of lack of evidence supporting the verdict. Respondent Kain met all these contentions, and cited a mass of evidence supporting the denial of the motion for judgment n.o.v. The court of appeals ruled that the motion for judgment n.o.v. was correctly denied, and, following a uniform line of authority from various federal circuits, held that the district court had no authority to grant a new trial on its own motion thirteen months after the date of judgment on the jury verdict.

Thereafter, petitioners sought to avoid the mandate requiring re-entry of the judgment on the jury verdict by repeating to the district court some of their appellate arguments, i.e., that the 1981 order had in fact ruled the motion for judgment to be "warranted" rather than "unwarranted" and "denied" because of conflicting evidence, as it stated. The district court, expressing criticism of the required reinstatement of judgment, then purported to "clarify" the 1981 order by totally changing it, as we have noted. The court of appeals, in its March 10, 1986, order and judgment, pointed out the transparent nature of the attempt to modify the 1981 order. (A21-A25).

In short, the district court first exceeded its jurisdiction under the applicable federal rules; and later, at petitioners' invitation, sought to exceed the clear limits of its authority in order to evade an appellate mandate which corrected the first violation.

The only departure from the accepted and usual course of judicial proceedings, in this decade-long litigation, has been by the district court, at petitioners' urging. The district court's repeated transgression of the legal limits of its power has resulted in unreasonable delay and denial of justice to respondent Kain.

Petitioners' distortion of, and omission of, material facts of record, in the lower courts continues in this Court. Petitioners are unable to cite any authority or good reason for this Court's review of the judgment below.

CONCLUSION

The petition should be denied, with sanctions imposed on petitioners under Rule 49.2.

Respectfully submitted,

GERALD SAWATZKY
(Counsel of Record)
700 Fourth Financial Center
Wichita, Kansas 67202
Telephone: 316/267-6371
Attorney for Respondent

APPENDIX

MAY TERM - JULY 16, 1986.

Before the Honorable Stephanie K. Seymour, Honorable Robert H. McWilliams, Circuit Judges and Honorable Wesley E. Brown, District Court Judge.

PHILIP KAIN d/b/a BROCK-KAIN CO.,	)	
Plaintiff-Appellant,	)	
vs.	)	No. 82-1300
WINSLOW MANUFACTURING, INC. and WATSCO INC.,	)	
Defendants-Appellees.	)	

Defendants-appellees' petition for rehearing filed June 5, 1986, is denied as untimely. Fed.R.App.P. 40(a).

ROBERT L. HOECKER, Clerk
By /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

Supreme Court, U.S.
FILED
SEP 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

No 86-258

In the Supreme Court of the United States

OCTOBER TERM, 1986

WINSLOW MANUFACTURING, INC.,
and WATSCO, INC.,
Defendants-Petitioners,

vs.

PHILLIP KAIN, d/b/a BROCK-KAIN,
Plaintiff-Respondent.

REPLY BRIEF OF PETITIONERS

GERRIT H. WORMHOUDT
(Counsel of Record)
THOMAS D. KITCH
JOHN E. COWLES
FLEESON, GOOING, COULSON & KITCH
Suite 1600, 125 North Market
P.O. Box 997
Wichita, Kansas 67201-0997
316-267-7361
Attorneys for Petitioners

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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Plaintiff-Respondent.

REPLY BRIEF OF PETITIONERS

In his Brief in Opposition, Respondent Kain simply ignores the basic issue presented by the petition for certiorari—whether the Tenth Circuit's invocation of the law of the case doctrine has effectively nullified the use of Fed.R.Civ.P. 60(b) to avoid manifest injustice.

Instead, Kain would mislead the Court by stating that the trial court determined in the new trial order which he entered in 1981 that "there was conflicting evidence sufficient to sustain the verdict," and that this was the reason why he refused to grant j.n.o.v. to Winslow and Watsco. This allegation is contradicted by the record, however, as the 1981 new trial order expressly concluded that: "Winslow and Watsco did not knowingly assist [co-defendant] Peel's in practicing unfair competition against plaintiff."

Kain's uncontrolled zealousness also causes him to mischaracterize the first decision by the court of appeals:

"The court of appeals ruled that the motion for j.n.o.v. was correctly denied." Respondent's brief at p. 6. But it is readily apparent from the decision of the court of appeals that it did *not* review the record to determine whether j.n.o.v. had been warranted or not. Rather, the court below simply relied upon its formalistic reading of a single phrase in the new trial order that j.n.o.v. was "unwarranted." Judge Theis subsequently explained, in granting Winslow's motion for relief from judgment under Rule 60(b), that this comment "meant that the remedy of directing a verdict was, in the sound exercise of the Court's discretion, unwarranted, not that the motion for judgment notwithstanding the verdict could not properly be granted."

The *only* judicial evaluation of the evidentiary record in this case was conducted by the *trial court,* which concluded, both in the 1981 new trial order and in the 1985 order granting relief from judgment, that Winslow and Watsco did not knowingly assist in unfair competition.

The Tenth Circuit has now compounded the injustice inherent in its original reversal of the order granting Winslow a new trial by holding that the law of the case doctrine forecloses any reconsideration of its misinterpretation of such order, as identified by the trial court in granting clarification under Fed.R.Civ.P. 60(b). The court of appeals reasoned that the foundation for such reversal formed by such misinterpretation was unchangeable because the misinterpretation had itself become the law of the case.

The decision of the Tenth Circuit contradicts the intended purpose of Rule 60(b) to provide federal courts the means with which to correct errors in order to preserve a just result. If the Tenth Circuit's decision is allowed

to stand, future litigants will have no avenue of relief under the federal rules to rectify misinterpretations and respond to changes of circumstances that Rule 60(b) was designed to cure. The court below has stretched the law of the case doctrine far beyond its intended application, threatening the viability of Rule 60(b).[1]

---

1. Winslow's petition herein was filed within ninety days following the entry of final judgment in the Tenth Circuit Court of Appeals. Respondent asserts that Winslow's petition for certiorari was untimely filed because it was filed more than ninety days after the initial clerk's order on the motion to recall the mandate is not supported by the cases cited by respondent. This Court has repeatedly held that only a final judgment of a court of appeals will toll the ninety-day period for filing a petition under 28 U.S.C. § 2101(c). *See, e.g., F.T.C. v. Minneapolis-Honeywell Co.*, 344 U.S. 206 (1952) (ministerial acts following a final judgment do not extend the ninety-day filing period); *United States v. Adams*, 383 U.S. 39 (1966) (an initial order of a court of appeals cannot be the subject of a petition until a conclusive judgment is entered); *Montgomery Bldg. & Constr. v. Ledbetter Erection Co.*, 344 U.S. 178, 180-1 (1952) (a petition for certiorari filed after an interlocutory judgment, but prior to a final judgment, is premature and cannot be granted until a final judgment is entered, even if the interlocutory judgment is dispositive of the final judgment). Thus, the initial clerk's order in this case could not be the subject of Winslow's petition for certiorari until such time as the final judgment was entered by the Tenth Circuit.

CONCLUSION

Rather than address the issue presented in the petition, Kain has sought to justify for the Tenth Circuit's erroneous application of the law of the case doctrine by claiming that the court of appeals had previously examined the evidentiary record to determine whether j.n.o.v. had been warranted. A simple reading of the Tenth Circuit's opinion reveals that this assertion is false.

This Court should grant a writ of certiorari to correct the Tenth Circuit's abuse of the law of the case doctrine and to remedy the manifest injustice in this case so that federal courts and litigators can continue to utilize the flexibility of Rule 60(b) to achieve a just result in all cases.

Respectfully submitted,

GERRIT H. WORMHOUDT
(Counsel of Record)
THOMAS D. KITCH
JOHN E. COWLES
FLEESON, GOOING, COULSON & KITCH
Suite 1600, 125 North Market
P.O. Box 997
Wichita, Kansas 67201-0997
316-267-7361
Attorneys for Petitioners